

FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

FERNANDO ASCENCIO,) D.C. CRIM. APP. NO. 2007/0013
)
Appellant,) Sup.Ct.Civ.No. 86/2006
)
v.)
)
PEOPLE OF THE VIRGIN ISLANDS,)
)
Appellee.)
)

On Appeal from the Superior Court of the Virgin Islands

Considered: July 10, 2009
Filed: November 10, 2010

BEFORE: **CURTIS V. GÓMEZ**, Chief Judge, District Court of the Virgin Islands; **RAYMOND L. FINCH**, Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Superior Court of the Virgin Islands, sitting by designation.

ATTORNEYS:

Debra Watlington, Esq., T.P.D.
St. Thomas, U.S.V.I.
Attorney for Appellant,

Elliott M. Davis, Esq., A.A.G.
St. Thomas, U.S.V.I.
Attorney for Appellees.

Per Curiam.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 2

Memorandum Opinion

In this case, we are tasked with deciding whether the Virgin Islands stalking statute is void for vagueness as applied to the facts of this criminal appeal. We are also called upon to determine whether the evidence adduced at trial was sufficient to convict this Appellant ("Mr. Ascencio" or "Appellant") of aggravated stalking under Virgin Islands law. For the reasons stated herein, we affirm Mr. Ascencio's conviction.

I. FACTUAL AND PROCEDURAL POSTURE

Mr. Ascencio and Lucy Ascencio ("Mrs. Ascencio") were married. Because of Mr. Ascencio's violent tendencies, Mrs. Ascencio sought a permanent restraining order against him. After a hearing on May 3, 2005, the Superior Court issued a restraining order prohibiting Mr. Ascencio from contacting his wife. The order remained in effect until May 3, 2007.

On February 3, 2006, while the restraining order was in effect, Mrs. Ascencio complained to police that when she and her daughter, Jessica Perez, went to pick up her other minor daughter from the Anna's Hope Head Start, Mr. Ascencio jumped out of the bushes, moved towards the vehicle she was driving, flailed his arms and threatened to kill them. Mrs. Ascencio and her daughter exited the vehicle, ran inside of the Head Start building and

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 3

called the police.

On February 5, 2006, Mr. Angel Linares ("Linares") an associate of the Ascencios, called the police and requested assistance at Mrs. Ascencio's home. Mr. Linares told police that Mr. Ascencio admitted to him that he had recently broken into and ransacked Mrs. Ascencio's residence. According to Mrs. Ascencio, a picture frame in the living room was stabbed, her daughter's dolls were sprayed with ketchup and her computer wires were cut. On February 14, 2006, following an investigation, Mr. Ascencio was arrested and charged in a three count information for contempt of court (count I); destruction of property (count II); and aggravated stalking (count III). All three counts were charged as acts of domestic violence.

On June 6, 2006, Mr. Ascencio filed a motion to dismiss the aggravated stalking charge as insufficient and void for vagueness.¹ The court held a hearing and denied his motion. (J.A. 41-68.) A trial was held from June 12 to 17, 2006. A jury acquitted Mr. Ascencio of destruction of property. He was found guilty of the remaining two counts.

On October 4, 2006, Mr. Ascencio was sentenced to a period of incarceration of two hundred and seventy days on count I and four years on count III. The court ordered the sentences to run

¹ The information was also amended on June 6, 2006. Mr. Ascencio proceeded to trial on the amended information.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 4

concurrently. This timely appeal followed.²

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review the judgments and orders of the Superior Court in criminal cases.³ See Act No. 6687 § 4 (2004).⁴ Generally, statutory interpretation, jurisdictional issues and legal error are subject to plenary review. *Gov't of the Virgin Islands v. Texido*, 89 F. Supp. 2d 680, 683 (D.V.I. App. Div. 2000); *Charleswell v. Gov't of the Virgin Islands*, 167 F.R.D. 674, 678 (D.V.I. App. Div. 1996). The trial court's findings of fact are reviewed for abuse of discretion. *Rivera v. Gov't of the Virgin Islands*, 635 F. Supp. 795, 798 (D.V.I. App. Div. 1986).⁵ Admission of evidence and testimony is also reviewed for abuse of discretion, but, to the extent the trial court's

² The court issued its written judgment and commitment on October 2, 2008.

³ Appellant's notice of appeal was filed on October 19, 2006.

⁴ See also Revised Organic Act § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541- 1645. (1994), reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

⁵ Even if the court abuses its discretion, the judgment may not be set aside unless the defendant made a sufficient proffer of evidence, and this Court finds that the excluded evidence would probably have substantial influence in bringing about a different verdict. V.I. CODE ANN. tit. 5, § 775.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 5

ruling turns on an interpretation of evidentiary rules, the review is plenary. V.I. CODE ANN. tit. 5, § 836(b); *Gov't of the Virgin Islands v. Petersen*, 131 F. Supp. 2d 707, 709-710 (D.V.I. 2001).

III. ANALYSIS

A. Void for vagueness⁶

On appeal, Mr. Ascencio argues that the aggravated stalking statute is void for vagueness, in violation of the Due Process Clause of the Fourteenth Amendment, made applicable to the Virgin Islands through the Revised Organic Act of 1954.⁷ "The concept of unconstitutional vagueness is derived from a basic notion of fairness; citizens must be given fair warning before being held culpable for conduct deemed to be criminal." *Gov't of the Virgin Islands v. Steven*, 134 F.3d 526, 527 (3d Cir. 1998) (citing *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (citations omitted)); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (citations omitted).

⁶ We exercise plenary review over Mr. Ascencio's void for vagueness challenge. *Steven*, 134 F.3d at 526.

⁷ The Fourteenth Amendment's Due Process Clause, providing that no state shall "deprive any person of life, liberty, or property without due process of law," U.S. CONST. Amend. XIV, § 1, is applicable to the Virgin Islands by virtue of Section 3 of the Revised Organic Act of 1954, 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2003), reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995 & Supp. 1997) (preceding V.I. CODE ANN. tit. 1).

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 6

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson* 461 U.S. 352, 357 (1986) (citations omitted). A statute is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning" *Steven*, 134 F.3d at 527. Conversely, a statute "meets the constitutional standard of certainty if its language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 527-528 (citing *United States v. Wise*, 550 F.2d 1180, 1186 (9th Cir. 1977)).

Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts as applied to the case at hand. *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (citations omitted); see also *United States v. Powell*, 423 U.S. 87, 92-93 (1975) (citations omitted); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-36 (1963) (citations omitted); see also *Soto v. Gov't of the Virgin Islands*, 344 F.Supp.2d 450, 454 (D.V.I. App. Div. 2004) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 7

455 U.S. 489, 494-495 (1982) (citations omitted) (a party mounting a vagueness challenge must establish that the statute is vague as applied to his individual circumstance and may not complain that the statute is generally vague as applied to others). To sustain such a challenge, the complainant must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Therefore, where the charged conduct clearly falls within that proscribed by the statute the vagueness challenge must fail. *United States v. Loy*, 237 F.3d 251, 259 (3d Cir. 2001); *Gov't of the Virgin Islands v. Steven*, 962 F.Supp. 682 (D.V.I. App. Div. 1997) (citing *Aiello v. City of Wilmington*, 623 F.2d 845, 850 (3d Cir. 1980) ("the litigant must demonstrate that the statute under attack is vague as applied to his own conduct, regardless of its potentially vague application to others")); see also *Parker v. Levy*, 417 U.S. 733, 755-56 (1974) (citations omitted) (one to whose conduct a statute clearly applies may not successfully challenge it for vagueness).

V.I. CODE ANN. tit. 14, § 2072, provides in pertinent part:

(a) A person is guilty of the crime of stalking who

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 8

purposely and repeatedly follows another person and engages in a course of conduct or makes a credible threat with the intent of annoying or placing that person in reasonable fear of death or bodily harm or injury.

(c) A person is guilty of the crime of aggravated stalking who commits the crime of stalking in violation of an existing court order prohibiting the behavior and shall be imprisoned for a period not to exceed 5 years, or may be fined up to \$15,000, or both.

Id. (emphasis added).

V.I. CODE ANN. tit. 14, § 2071 (2005), defines "course of conduct" as,

knowing and willful action directed at a specific person, composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

Id.

Mr. Ascencio's vagueness challenge is directed solely at 14 V.I.C. § 2071(a). He argues that § 2071(a) defines "course of conduct" as conduct that is "composed of a series of acts over a period of time, however short, evidencing a continuity of purpose which alarms or annoys that person." See 14 V.I.C. § 2071(a) (2004) (emphasis added). Ascencio contends that the terms "alarms" and "annoys" are ambiguous and highly subjective and render the statute impermissibly vague. (App. Br. 9-15.)

Mr. Ascencio's challenge, however, refers to an antiquated

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 9

version of the statute. Compare 14 V.I.C. § 2071(a) (2004) (employing the terms "alarms" and "annoys") with 14 V.I.C. § 2071(a) (2005) (eliminating the terms "alarms" and "annoys"). On March 5, 2005, the Virgin Islands legislature amended § 2071(a) by deleting the phrase "alarms or annoys." See 14 V.I.C. § 2071(a) (2005); Sess. L. 2005 at 73, Mar. 5, 2005, No. 6730 amending 2071(a). The legislative amendment redefined the prohibited conduct as "knowing and willful action directed at a specific person, composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." See *id.*

Mr. Ascencio was charged almost one year after the statutory amendment.⁸ Both the original and amended charging documents tracked the statutory amendment and specifically accused Ascencio of "purposely and repeatedly engag[ing] in conduct that placed Lucy Ascencio in fear of bodily harm by constantly violating a permanent restraining order by threatening to kill her. . . ." (J.A. 11.)

Hence, Mr. Ascencio was charged, pursuant to the amendment, with a course of conduct directed at placing Mrs. Ascencio in reasonable fear of death or bodily injury, as opposed to annoying or alarming her. Mr. Ascencio does not challenge the amendment,

⁸ The statute was amended on March 5, 2005. Mr. Ascencio was initially charged on February 28, 2006 and went to trial on an information amended on June 6, 2006.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 10

and we do not find the amendment vague. Thus, the Government's position is most persuasive, and Mr. Ascencio's section 2071(a) void for vagueness argument is without merit.

B. Sufficiency of the evidence for aggravated stalking

The standard of review for a sufficiency of the evidence challenge is plenary. *United States v. Taftsiou*, 144 F.3d 287, 290 (3d Cir. 1998). In determining the sufficiency of the evidence for a conviction, the Court must view the evidence in the light most favorable to the government. *Id.* The jury verdict is sustained "if any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Wolfe*, 245 F.3d 257, 261 (3d Cir. 2001) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979) (citations omitted)). An appellant who attempts to challenge the sufficiency of the evidence bears a heavy burden. *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990).

To convict Mr. Ascencio of aggravated stalking, the Government was required to prove and the jury required to find beyond a reasonable doubt that: 1) a court order prohibited Ascencio from stalking Mrs. Ascencio; 2) Mr. Ascencio had knowledge of the order; and 3) Mr. Ascencio violated that order by stalking Mrs. Ascencio. See *Gov't of the Virgin Islands v. Crossley*, 35 V.I. 100, 104 (Terr. Ct. 1997) (listing elements of

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 11

aggravated stalking under the Virgin Islands Code.)

Mr. Ascencio challenges only the sufficiency of the evidence to prove stalking. A plain reading of the Virgin Islands stalking statute reveals two factual scenarios in which an individual may be held criminally liable for stalking.⁹ The first scenario is where a person: a) purposely; and b) repeatedly follows another person; and also c) engages in a prohibited "course of conduct." See 14 V.I.C. § 2072(a). The second scenario occurs where a person makes a "credible threat" with the intent of either: a) annoying another; or b) placing another in reasonable fear of death or bodily harm or injury.¹⁰ See *id.*

V.I. CODE ANN. tit. 14, § 2071(b), defines "credible threat" as,

an explicit or implicit threat made with the intent and the apparent ability to carry out the threat, so as to cause the person who is the target of the threat to reasonably fear for their safety or the safety of a member of the person's family.

⁹ "The starting point in every case involving construction of a statute is the language itself." See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (citations omitted).

¹⁰ Because each phrase of the statute is connected with the disjunctive "or," in a context that clearly contemplates alternative types of behavior constituting the crime, they are each to be given independent meaning. See *United States v. Parcel of Real Property Known at 6109, Grubb Road, Millcreek Tp. Erie County, Pa.*, 886 F.2d 618, 626 (3d Cir. 1989) ("canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise") (citation omitted).

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 12

Id.

The amended information charges that,

on or about February 3, 2006, [Fernando Ascencio, Jr.], did purposely and repeatedly engaged [sic] in courses of conduct that placed Lucy Ascencio in fear of death or bodily harm by constantly violating a Permanent Restraining Order by threatening to kill her, her children and himself at the Anna's Hope Head Start School, while there was an existing court order prohibiting such behavior; Fernando Ascencio, Jr., and Lucy Ascencio having been husband and wife, an act of domestic violence, in violation of Title 14 V.I.C. § 2072(c), and 16 V.I.C. § 91(b)(13).

(J.A. 11.)

The amended information does not recite verbatim the statutory language for "credible threat" stalking. See 14 V.I.C. § 2072(a). Rather the language of the amended information expressly accuses Mr. Ascencio of "purposefully and repeatedly" engaging in "courses of conduct" that placed his wife in fear of death or bodily harm. (J.A. 11.); see also 14 V.I.C. § 2072(a).

1. 'Repeated course of conduct' stalking

Under the repeated course of conduct scenario, a plain reading reveals that a finding of repeated conduct is an explicit statutory prerequisite for stalking. See 14 V.I.C. § 2072(a). First, the statute flatly requires that the accused "repeatedly"

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 13

follow another.¹¹ See *id.* The Virgin Islands Code does not define the word "repeatedly"; however, "repeatedly" is a word of such common understanding that its meaning is not vague.¹² It simply means the perpetrator must follow the victim more than one time.¹³

The facts of this case support only one instance of

¹¹ A person is guilty of the crime of stalking who purposely and repeatedly follows another person and engages in a course of conduct or makes a credible threat with the intent of annoying or placing that person in reasonable fear of death or bodily harm or injury. See 14 V.I.C. 2072(a) (emphasis added).

¹² "Webster's Dictionary defines 'repeated' as "said, done or presented again." *People v. Heilman*, (1994) 25 Cal.App.4th 391, 400 [30 Cal.Rptr.2d 422] (citing WEBSTER'S THIRD NEW INT'L DICT. 1924 (1981)); see also *State v. Rico*, 741 So. 2d 774, 777 (La. 1999) (defining repeated as "renewed or recurring again and again").

¹³ Other jurisdictions interpret "repeated", "pattern" and "course of conduct" in their stalking and harassment statutes to require more than one instance of conduct. See *People v. Payton*, 161 Misc. 2d 170, 174, 176 (N.Y. City Crim. Ct. 1994) ("[t]he mere act of following the complainant or approaching the complainant, if standing alone, may not be sufficient to allege [stalking]"); see also *Commonwealth v. D'Collanfield*, 2002 PA Super 266 (Pa. Super. Ct. 2002) (under Pennsylvania law [18 PA. CONS. STAT. ANN. § 2709(b)] (2000), the first element of the crime of stalking is engaging in repetitive following); see 725 ILL. COMP. STAT. ANN. 5/112A-3 (2000) (perpetrator must follow victim on two separate occasions); Colo. REV. STAT. § 18-9-111 (1998) ("'repeatedly' means on more than one occasion"); HAW. REV. STAT. § 711-1106(1) (Supp. 2008) (same); N.C. GEN. STAT. § 14-277.3A (2010) (course of conduct means "two or more acts"); VA. CODE ANN. § 18.2-60.3 (2010) (stalking defined as prohibited conduct which occurs "on more than one occasion"); *Rico*, 741 So. 2d at 777 (overturning stalking conviction based on only one instance of following the victim).

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 14

conduct, namely, Mr. Ascencio's actions near the Head Start center on February 3, 2006.¹⁴ Accordingly, there was insufficient evidence adduced at trial to support a conviction under the 'repeated course of conduct' prong of the statute; thus, this Court must now determine whether there was sufficient evidence to find Mr. Ascencio guilty of stalking under the 'credible threat' prong.

2. 'Credible threat' stalking

The charging document does not explicitly employ the term "credible threat" when characterizing Mr. Ascencio's threat to kill Mrs. Ascencio and her daughter. Consequentially, before we reach the question of whether there was sufficient evidence to find Mr. Ascencio guilty of credible threat stalking, the Sixth Amendment compels us determine whether Mr. Ascencio was sufficiently charged with making a credible threat against Mrs. Ascencio. See *United States v. Whited*, 311 F.3d 259, 262-263 (3d Cir. 2002) ("We consider an indictment sufficient if, when considered in its entirety, it adequately informs the defendant of the charges against her that she may prepare a defense and invoke the double jeopardy clause when appropriate."); *United*

¹⁴ The parties do not dispute that Mr. Ascencio was acquitted of destroying Mrs. Ascencio's property. Mr. Ascencio's acquittal left only his conduct on the afternoon of February 3, 2006, to support a conviction for purposeful and repeated stalking.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 15

States v. Lott, 240 Fed. Appx. 992, 995 (3d Cir. 2007).

a. Sufficiency of the Amended Information

Although Mr. Ascencio does not challenge the sufficiency of the information in his brief, he did file a pre-trial motion to dismiss the aggravated stalking charge as insufficient. A pre-trial hearing was held. (J.A. 41-68.)

At the hearing, the court glossed over the sufficiency of the information for credible threat stalking when it summarily held that the information sufficiently charged Mr. Ascencio with "making threats." (J.A. 64.) Partially on this basis, the court denied Mr. Ascencio's motion. Our review of the trial court's decision concerning the sufficiency of the information is plenary. See *United States v. Henry*, 29 F.3d 112, 113 (3d Cir. 1994); *Gov't of the Virgin Islands v. Moolenaar*, 133 F.3d 246, 247 (3d Cir. 1998) (citation omitted).

Federal Rule of Criminal Procedure 7(c)(1) governs the nature and contents of indictments and informations and provides, in pertinent part:

- (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 16

. . . .

Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

Fed. R. Crim. P. 7(c) (1).

In *Russell v. United States*, 369 U.S. 749 (1962) (citations omitted), the U.S. Supreme Court employed a two-part test established in prior cases for measuring the sufficiency of a criminal charging document: 1) whether the charging document contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and 2) whether the charging document enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.¹⁵ *Id.* at 763-64 (emphasis added).¹⁶ We apply the principles of *Russell* to this case.

i. Elements of the offense charged

¹⁵ We have applied the *Russell* test interchangeably to challenges to the sufficiency of an indictment and an information. See *Moolenaar*, 133 F.3d at 247-250 (citing *Gov't of the Virgin Islands v. Pemberton*, 813 F.2d 626, 631 (3d Cir. 1987)).

¹⁶ See also *United States v. DeLaurentis*, 230 F.3d 659, 660 (3d Cir. 2000); *United States v. Jones*, 299 Fed. Appx. 187, 189 (3d Cir. 2008) (unpublished opinion) ("[w]e consider an indictment sufficient if, when considered in its entirety, it adequately informs the defendant of the charges against her such that she may prepare a defense and invoke the double jeopardy clause where appropriate").

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 17

As to Russell's first prong, while the amended information does not explicitly allege that Mr. Ascencio made a "credible threat" against his wife and her children, the Third Circuit has held that a criminal charging document is not insufficient solely because it fails to frame the charges in exact statutory terms. *Id.*; see also *Gov't of the Virgin Islands v. Moolenaar*, 133 F.3d 246, 247-250 (3d Cir. 1998) (quoting 24 Moore's Federal Practice, § 607.04 [2] [b] [ii] (3d ed. 1997)) ("failure to allege the statutory elements will not be fatal provided that alternative language is used or that the essential elements are charged in the indictment by necessary implication").

Reading the amended information as a whole, the language of the charging document adequately gave Mr. Ascencio notice that he was criminally charged with making a credible death threat, on February 3, 2006, against both Mrs. Ascencio and a member of her family, while having the intent to place them in reasonable fear of death or bodily injury, coupled with the apparent present physical ability to carry out the threat. The charging document also informed Mr. Ascencio that the threats were made in violation of a standing restraining order and sufficiently informed him of the enhancement factor which elevated the charge to aggravated stalking. In sum, the amended information fully apprised Mr. Ascencio of the charges against him such that he

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 18

could prepare an adequate defense at trial.

ii. Future Prosecution

As to Russell's second prong, Mr. Ascencio is not in danger of double jeopardy. *Russell*, 369 U.S. at 763-764. Here, the amended information described the conduct alleged and provided the date and location of the offense. *Id.* at 764; *see also Moolenaar*, 133 F.3d at 250. Mr. Ascencio may refer to the entire record of the prosecution to avoid twice being tried for the same crime. *Moolenaar*, 133 F.3d at 250. Accordingly, the amended information was sufficient to charge Mr. Ascencio with credible threat stalking.

b. Sufficiency of the evidence for 'credible threat' stalking

At trial, the jury heard testimony from Mrs. Ascencio and Mr. Linares, who both testified that Mr. Ascencio ran out from behind bushes and moved towards Mrs. Ascencio's vehicle while threatening to kill her. (Supp. App. 78-79); (J.A. 76.) Loudina Powell, who was at the scene of the incident, also heard Mr. Ascencio shouting threats. (J.A. 180.) Natalie Bailey, who worked at the Head Start Center, testified that she observed an afraid, upset and nervous Mrs. Ascencio after the incident and prior to contacting police. (J.A. 181.) The jury weighed the credibility of the witnesses' testimony and other evidence

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 19

presented and found Mr. Ascencio guilty of aggravated stalking. We therefore affirm the Superior Court's decision that this evidence was sufficient for a rational jury to find beyond a reasonable doubt that Mr. Ascencio made a credible threat against Mrs. Ascencio with the intent of placing her in reasonable fear of death or bodily injury.

B. Compulsory Due Process

Mr. Ascencio also argues that his compulsory due process rights were violated when the trial court excluded testimony proffered to show that Mrs. Ascencio's fear was "fabricated and selective." (Appellant's Br. at 24.) The Sixth Amendment to the United States Constitution provides the accused in a criminal prosecution the right to offer the testimony of favorable witnesses and "to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI; *Gov't of the Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992). The Supreme Court has extended the Compulsory Process Clause to cover a criminal defendant's right to present witnesses or evidence in his defense, "even though [such a right] is not expressly described in so many words." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (citations omitted); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (citations omitted).

The right, however, is not absolute. *Mills*, 956 F.2d at

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 20

446. The Sixth Amendment requires more than a mere showing by the accused that some relevant evidence was excluded from his trial. *Id.* Rather, the accused must show how that testimony would have been both material and favorable to his defense. *Id.*; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) (citations omitted). Evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Mills*, 956 F.2d at 446.

At trial, Mr. Ascencio intended to use the testimony of David Carter ("Carter"), presumably Mr. Ascencio's co-worker, to show that Mrs. Ascencio came to her husband's job on several occasions. (J.A. 201.) Mr. Ascencio submits that such testimony was material because it would have demonstrated that "Mrs. Ascencio's alleged state of fear was fabricated and selective." (App. Br. 18.) The trial court excluded the evidence as irrelevant and explained,

. . . this is a criminal case dealing with a particular day in question with a particular set of actions. What she may have felt about him on another day does not factor into what occurred on that day of February 3.

(J.A. 204.)

Mr. Ascencio assigns error to the exclusion of Carter's testimony; however, the governing stalking statute does not require the prosecution to prove that Mrs. Ascencio feared her

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 21

husband prior to the incident alleged, or even after its occurrence. Instead, the jury was statutorily required to find and did find beyond a reasonable doubt that Mr. Ascencio made a credible threat against his wife with the intent and apparent ability to place her in reasonable fear of death or bodily injury. See 14 V.I.C. § 2072(a).

The jury's question was, thus, an inquiry into Ascencio's intent and corresponding conduct -- not a question of Mrs. Ascencio's pre-incident or post-incident emotive responses to her husband. Hence, whether Mrs. Ascencio was afraid of Mr. Ascencio during the months, weeks or days prior to the incident was not material to whether he intended to place his wife in reasonable fear of death or bodily injury at the time of the incident. See *Mills*, 956 F.2d at 446 ("The Sixth Amendment requires more than a mere showing by the accused that some relevant evidence was excluded from his trial. Rather, the accused must show how that testimony would have been both material and favorable to his defense."). Accordingly, in the absence of Mr. Carter's testimony, Mr. Ascencio received a fair trial, worthy of confidence in the verdict rendered.¹⁷

¹⁷ See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (the touchstone of materiality is a "reasonable probability of a different result," the question is whether in the absence of excluded evidence the defendant, "received a fair trial, understood as a trial resulting in a verdict worthy of

Fernando Ascencio v. People of the Virgin Islands
D.C. Crim. App. No. 2007/0013
Memorandum Opinion
page 22

IV. CONCLUSION

For the reasons cited above, we **AFFIRM** Fernando Ascencio's conviction for aggravated stalking.

confidence") .